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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1333

LESTER ARTHUR CORSON
and ALFRED SUSKIN,
Petitioners,

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,
Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

Petition for Writ of Certiorari Directed to the Court of Appeal, Second Appellate District, State of California

PETITION FOR WRIT OF CERTIORARI

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IN THE

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LESTER ARTHUR CORSON
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PETITION FOR WRIT OF CERTIORARI

Your petitioners respectfully petition for a writ of certiorari directed to the Court of Appeal, Second Appellate District, State of California, to review and reverse an order and judgment denying a petition for writ of mandate and prohibition and/or any other appropriate writ, on the ground that their arrest was illegal and that the search and seizure of their automobile and the seizure of films were in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1257, U.S. Codes, and by Rules of this Court.

The petition for writ of mandate and prohibition and/or any other appropriate writ was denied on December 7, 1972.

A petition for hearing was duly filed in the Supreme Court of the State of California and a hearing was denied on January 5, 1973.

This petition is being filed within the time allowed by law.

OPINION BELOW

The minutes of the Court of Appeal, second Appellate District, State of California, for December 7, 1972 are attached hereto, marked Appendix "A" and made a part hereof.

The order of the Supreme Court of California denying a hearing herein, dated January 5, 1973, is attached hereto, marked Appendix "B" and made a part hereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein are the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States; Title 47, Section 605, U.S. Codes; Sections 311.2, 311.9, 995 and 1538.5 of the Penal Code of California.

THE FACTS

The defendants were arrested in Malibu, California, without any arrest warrant or without any search warrant.

Without any *Miranda* warning, and without any search warrant or consent of any Magistrate, Deputy Sheriffs seized 500 rolls of film from the back of the automobile in which they were riding, without having looked at the film to actually determine whether there was probable or any cause to seize the film while holding the defendants in custody under arrest.

The defendants were thereafter charged with conspiracy to violate Section 311.2 and Section 311.9 of the Penal Code of the State of California.

The People stipulated that they had no search warrant and no arrest warrant. (R.T. 5, 6, Prel. Hrg.)

On or about August 30, 1971 Paul R. George, a Deputy Sheriff connected with the Sheriff's Vice Squad, was seeking film which he thought could be illegal. He was using a telephone without the consent of the telephone company or any Magistrate. He called a number which was the private residence of Alfred Suskin. He gave a fictitious name as Paul Genarian and continued to have a conversation with a person who identified himself as Al London and to whom the officer gave the fictitious name for himself.

Pretending to be interested in buying some 8 mm color film to take to another State, he made an appoint-

ment on the telephone to meet the defendant in a parking lot at Fairfax and Santa Monica Boulevard. The defendant did not show up at the appointed time and the officer continued to wait for 45 minutes without the defendant having made any appearance.

Again using the telephone without the consent of the telephone company or any Magistrate, the officer called again and asked the defendant on the telephone "What do you have?" He gave no *Miranda* warning again. He said the defendant replied "I have six numbers that show everything."

Other telephone conversations followed without the consent of the telephone company or any Magistrate or any official. (*People v. Treiber,* 28 Cal. 2d 659). In the telephone conversation that followed, the officer negotiated and arranged for a meeting the next day next to the Raft Restaurant in Malibu.

The following day, Suskin was driven to the location by Corson. Suskin got out of the car and met the officer, who then pulled out $4,000 from his pocket and another $200 for the quoted price of the film and packages of playing cards.

Immediately, the Deputy Sheriff who had negotiated the deal and several other deputies seized all of the film in the automobile without looking at or examining it and upon a prearranged signal from the officer who had negotiated the deal and who thereupon took away the money from Suskin that he had given to him.

At the preliminary hearing officer George testified that he did not look at any film or see any pictures in any film prior to the arrest and seizure. His testimony follows:

"A. No, I didn't see the actual film with the pictures on it prior to the arrest. No, I did not.

"Q. And you and your associates seized the film and took it in your possession without having actually seen a single film; is that not right?

"A. That's correct.

"Q. At the time you and your associate officers seized the film, neither you nor any of your associate officers actually knew there were 500 or any 8 millimeter color films in white boxes, of your own knowledge?

"A. It was represented to me at the time of the sale.

* * *

"Q. I mean that you did not know the contents of those boxes until after the arrest. That is a simple question.

"You did not know the exact nature of the contents of those boxes by having looked at them and seeing them, as you are trying to show the Court today that there was film or color film, 8 millimeter color film. Is that right?

"A. If what you mean is that I examined the contents of the boxes prior to the arrest, no. (R.T. 42-43 Prel. Hrg.).

The Magistrate overruled any objections to the

arrest or the seizure made without probable cause, and overruled the contention of the defendants that they had been entrapped in violation of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. The Magistrate held the defendants to answer as did the trial court, overruling the objection that the search and seizure were unlawful and that the defendants had been entrapped, that there had been no consent as required by the law of the State of California for the use of the telephone from the telephone company, and no consent for the search and seizure from any Magistrate.

Pursing their rights under Sections 995 and 1538.5 of the Penal Code of California, the Court of Appeals, Second Appellate District denied an application for a write of Mandate and prohibition and any other appropriate writ, without opinion. The Supreme Court of California, within the time allowed by law, denied a petition for hearing, without opinion. This petition for writ of certiorari follows.

QUESTIONS PRESENTED

1. Whether seizure of film in an automobile, without a search warrant and without any description of the things to be seized, and without the officers having seen the contents of the property they were taking before they seized it, violates the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether film that is seized without an examination and determination of its contents as a free expression of ideas violates the First Amendment to the Constitution of the United States.

3. Whether the seizure of film prior to its determination by a hearing that its dominant theme is such as appeals to a prurient interest in sex or that the material is patently offensive because it affronts contemporary community standards relating to sexual matters, or that the material is utterly without redeeming social values, violates the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Whether the use of the telephone by an officer using a phony name and trying to get the defendant to meet him after he was unsuccessful was entrapment as a matter of law and violated the Fifth and Fourteenth Amendments to the Constitution of the United States.

5. Whether an entry by telephone into the home obtained by trickery, stealth or subterfuge renders a search and seizure thereafter invalid.

REASONS FOR GRANTING THE WRIT

I

THE FOURTH AMENDMENT FORBIDS UNLAWFUL SEIZURE WITHOUT WARNING THAT THE MEN CONDUCTING THE SEIZURE ARE POLICE OFFICERS. (*MASSIAH v. U.S.*, 377 U.S. 201, 12 L.ED. 2d 246; *MIRANDA v. ARIZONA*, 384 U.S. 436, 16 L.ED.2d 694)

The Fourth Amendment forbids the seizure of property without a search warrant and without probable cause, describing the things to be seized. There was no description of the things to be seized. The officers had not seen the contents of the property they were taking.

There was no evidence in the possession of the officers that the material was obscene, or that the material was not protected by the First Amendment. There was no information in the possession of the officers that (a) the dominant theme of the material taken as a whole appealed to a prurient interest in sex; (b) that the material is patently offensive because it affronts contemporary community standards relating to sexual matters; and (c) that the material is utterly without redeeming social values.

There was therefore no evidence in the possession of the officers on which they could lawfully seize the boxes, unidentified and not seen, by acting arbitrarily and capriciously and then looking to see at a later

time and away from the location, what they contained.

For all the officers could determine, these could be tapes of a Bible course. The boxes might be too small for Gideon Bibles. But all they knew was hearsay and did not warrant a search and seizure.

II

THE DEFENDANTS WERE ENTRAPPED AS A MATTER OF LAW.

The officer, using a phony name, tried to get Mr. Suskin to meet him and was unsuccessful. He tried again by telephone, without any authority, for another time and place, and pretended he wanted to buy the film to take out of the States. This time he succeeded in setting up a meeting which led to the arrest of the defendants.

There is no evidence in the record anywhere that but for the telephone calls and persuasion of the officer that he would be able to set up a trap which would ensnare Suskin. Conduct such as this has been held to be entrapment as a matter of law. There was no evidence that Suskin showed any predisposition to commit the offense charged and the officers were successful in persuading him to meet the officer and be solicited into obtaining what later proved to be film.

As said in *Osborn v. U.S.*, 385 U.S. 323, 17 L. Ed. 2d 394: "Of course, when solicitation by the concealed government agent goes so far as to amount to entrapment, the prosecution fails. *Sorrells v. U.S.*, 287 U.S.

435, 77 L. Ed. 413; *Sherman v. U.S.*, 356 U.S. 369, 2 L. Ed. 2d 848 But the 'dirty business' (*Olmstead v U.S.*, 277 U.S. 438, 470, 72 L. Ed. 944, 952 (Mr. Justice Holmes dissenting)) does not begin or end with entrapment. Entrapment is merely a facet of a much broader problem. Together with illegal searches and seizures, coerced confessions, wiretapping, and bugging, it represents lawless invasion of privacy. It is indicative of a philosophy that the ends justify the means."

III

THE ARREST OF THE DEFENDANTS WAS THE EFFECT OF TRICKERY, STEALTH AND SUBTERFUGE, RENDERING THE SEARCH AND SEIZURE ILLEGAL.

In *People v. Reeves*, 61 Cal. 2d 268, 273, the court said:

> "It is well settled by both federal and state decisions that 'an entry obtained by trickery, stealth or subterfuge renders a search and seizure invalid.' (*People v. Roberts*, 47 Cal. 2d 374, 378; to the same effect see *People v. Albert*, 182 Cal. App. 2d 729, 737; *Gouled v. United States*, 255 U.S. 298, 385, 65 L. Ed. 647, 651; *Fraternal Order of Eagles, No. 778 v. United States*, 67 F. 2d 93).
>
> "But, although the officers had no legal right to rely on facts gained by ruse of subterfuge in determining whether they had reasonable and probable cause to enter, search and arrest, it still remains to be determined, when the officers ar-

rived at the King George Hotel and found that Reeves was there registered, did they, at that moment, know sufficient facts so as to have had reasonable and probable cause to enter the room without a warrant?"

In *People v. Treiber,* 28 Cal. 2d 659, the Supreme Court of California held that the subscriber of the telephone cannot, without the approval of the telephone company, authorize a connection to a telephone wire. A subscriber is also liable to punishment if he permits another to make a connection and use the telephone without the authority of the operator of the system. No permission was obtained by the Sheriff's Deputy either from the telephone company or by an authorized Magistrate to conduct a search of the defendants by lawless invasion of privacy. Without doubt, the officer seeking to buy film was an active participant as an instigator in the alleged crime—an agent provocateur.

See also: *People v. Roberts,* 47 Cal. 2d 374, 378; *People v. Albert,* 182 Cal. App. 2d 729, 737; *Gouled v. U. S.,* 255 U.S. 298, 305, 65 L. Ed. 647, 651; *Fraternal Order of Eagles, No. 778 v. U.S.,* 57 F. 2d 93; *People v. Reeves,* 61 Cal. 2d 268, 273.

IV

THE SOLICITATION BY THE CONCEALED GOVERNMENT AGENT, THE DEPUTY SHERIFF, AMOUNTS TO ENTRAPMENT AND THE PROSECUTION FAILS AND DEFENDANTS ARE ENTITLED TO THE SUPPRESSION AND RETURN OF THE EVIDENCE. (*SORRELLS v. U.S.*, 287 U.S. 435, 77 L.ed. 413; *SHERMAN v. U.S.*, 356 U.S. 369, 2 L.ed.2d 848; *MAPP v. OHIO*, 367 U.S. 643, 6 L.ed.2d 1081)

V

THE SEARCH AND SEIZURE OF FILM IS PROTECTED BY THE FIRST AND FOURTEENTH AEMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Unless the facts sustain all three elements of obscenity, namely, appeal to prurient interest, excess over accepted standards, and lack of redeeming social importance, where the material is so found to lack one of the elements of obscenity, the courts cannot supply this element. (*Ross v. U.S.*, 354 U.S. 476, 1 L. Ed. 2d 1498; *People v. Noroff*, 67 Cal. 2d 791, and cases cited on page 796; *People v. Rosakos*, 268 Cal. App. 2d 500; *In re Gianimi*, 69 Cal. 2d 563).

VI

NO *MIRANDA* WARNING

In carrying on their attempted deal, the defendants were not given the *Miranda* warning by the officers (*Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694). All of the interrogation by the officer from the start of his telephoning constituted a search for film that the officer deemed obscene. It was an illegal search under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and the result of that illegal search should be suppressed and the evidence returned.

WHEREFORE, petitioners pray that this Honorable Court grant a writ of certiorari for the reasons above stated and order the case dismissed.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners

EXHIBIT "A"

MINUTES FOR DECEMBER 7, 1972

DIVISION ONE:

2nd Civil 41257 Corson, et al *vs.* Superior Court, Los Angeles

THE COURT:

PETITION FOR WRIT OF PROHIBITION/MANDATE DENIED

CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, does hereby certify that the preceding is a true and correct copy of the minute order of this Court, as shown by the records of my office.

Witness my hand and the seal of this Court this 15th day of February, A.D., 1973.

CLAY ROBINS, JR., Clerk
By G. Williams,
Deputy Clerk

EXHIBIT "B"

ORDER DUE
January 5, 1973

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 1, Civil No. 41257

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CORSON ET AL.

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY

Petition for hearing DENIED.

FILED
JAN 3 1973
G. E. BISHEL Clerk
BY _____ Deputy

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 15th day of February A.D. 1973

Clerk
By _____ Deputy Clerk

WRIGHT, C. J.
Chief Justice